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10/581,010	02/16/2007	Maria Gross	3706	6838

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MICHAEL J. STRIKER
103 EAST NECK ROAD
HUNTINGTON, NY 11743

EXAMINER

BOMBERG, KENNETH

ART UNIT	PAPER NUMBER
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3754

NOTIFICATION DATE	DELIVERY MODE
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06/24/2010

ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

striker@strikerlaw.com

Office Action Summary	Application No. 10/581,010	Applicant(s) GROSS ET AL.	
	Examiner KENNETH BOMBERG	Art Unit 3754	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 24 May 2010.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-4 and 6 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-4 and 6 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 30 May 2006 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on May 24, 2010 has been entered.

Drawings

2. Replacement drawings were received on May 24, 2010. These drawings are not approved for the reasons discussed in the objection to the specification based on new matter discussed below.

3. The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. Therefore, the:

Structure described in claims 1 and 2 as “a spring-elastic valve stem” (while the valve stem 8 is depicted per se, it being “spring-elastic” is not).

Must be shown or the feature(s) canceled from the claim(s). No new matter should be entered.

Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing

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should not be labeled as “amended.” If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either “Replacement Sheet” or “New Sheet” pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

Specification

4. The amendment filed May 24, 2010 is objected to under 35 U.S.C. 132(a) because it introduces new matter into the disclosure. 35 U.S.C. 132(a) states that no amendment shall introduce new matter into the disclosure of the invention. The added material which is not supported by the original disclosure is as follows:

The replacement sheets 1 and 2 of 5 include a modification at the base of the valve stem (8) in figures 1 and 3. The modification is depicted as a zigzag line to either side of the base of the valve stem. According to applicant’s remarks, this is intended to schematically depict the claimed “spring-elastic valve”. The zigzag line is not part of the cross hatched structure depicting the structure identified as the valve stem (8), but instead appears to be depicted as part of an unidentified structure to either side of the valve stem. The specification as originally filed has inadequate support to conclude that the “spring-

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elastic valve” described in applicants remarks as being depicted schematically as resilient structure in the form of left and right elements to either side of the valve stem is what was originally disclosed by applicant. There are many different arrangements that could conceivably be intended to be described by the term “spring-elastic valve”, however the disclosure as originally filed does not support applicants possession of the particular arrangement described in applicants remarks as depicted in the replacement drawings.

Applicant is required to cancel the new matter in the reply to this Office Action.

5. The specification is objected to as failing to provide proper antecedent basis for the claimed subject matter. See 37 CFR 1.75(d)(1) and MPEP § 608.01(o). Correction of the following is required:

In Reference to Claims 1 and 2

While the phrase “spring-elastic valve stem” finds literal antecedent basis in the specification, it does not find clear support or antecedent basis in the description so that the meaning of this phrase in the claims may be ascertainable by reference to the description. The examiner is unfamiliar with this phrase and it is unclear if it has an art known specific meaning or is merely an imprecise translation of the valve stem having an elastic spring.

Claim Rejections - 35 USC § 112

6. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

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7. Claims 1-4, and 6 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In Reference to Claim 1

The preamble recites a “foam head (1) *for a propellant container (2)*”, the foam head has been disclosed as being the structure (1) depicted in Figs. 5-6 (see brief description of the drawings) and that it “can be actuated and remains joined to the propellant container 2” (specification page 2, lines 29-31). The body of the claim subsequently recites the “foam head” comprising the valve plate (5) and the valve stem (8). In light of the discrepancy between the specification’s characterization of what comprises the “foam head” and that of the claims, the claim recitation is not clearly understood when read in light of the specification.

In line 6, “a foam dispensing opening (7) seated directly on the valve stem (8)” is not clearly understood as read in light of the specification. Specifically, the foam dispensing opening (7) as disclosed in conjunction with figures 1, 5-9, and 11 is located at the top region of the foam head (1) and is separated from the valve stem by a vertical passage of the foam head (1). Consequently, read in light of the disclosure, the dispensing opening (7) would not be fairly characterized as being “seated directly on the valve stem” and the relationship is therefore not clearly understood.

In line 8, it is unclear what structures would or would not comprise “a spring-elastic valve stem”. The specification does not adequately describe the structure to

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understand how the phrase “spring-elastic” limits the valve stem or what valve stems would or would not be encompassed as “spring-elastic”.

In lines 11-12, it is unclear if the “outer diameter” makes reference to the “lower portion” or “lower region”.

In lines 17-18, “for receiving an annular spring” is not understood within the context of the claim and disclosure. Specifically, the “at least one recess” is disclosed on page 3, lines 32-34 as “forming” the “annular spring”; it is therefore unclear what is meant by “receiving” within the context of the claim and disclosure.

In Reference to Claim 2

In line 6, “a foam dispensing opening (7) seated directly on the valve stem (8)” is not clearly understood as read in light of the specification. Specifically, the foam dispensing opening (7) as disclosed in conjunction with figures 1, 5-9, and 11 is located at the top region of the foam head (1) and is separated from the valve stem by a vertical passage of the foam head (1). Consequently, read in light of the disclosure, the dispensing opening (7) would not be fairly characterized as being “seated directly on the valve stem” and the relationship is therefore not clearly understood.

In line 8, it is unclear what structures would or would not comprise “a spring-elastic valve stem”. The specification does not adequately describe the structure to understand how the phrase “spring-elastic” limits the valve stem or what valve stems would or would not be encompassed as “spring-elastic”.

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In lines 16-17, “for receiving an annular spring” is not understood within the context of the claim and disclosure. Specifically, the “at least one recess” is disclosed on page 3, lines 32-34 as “forming” the “annular spring”; it is therefore unclear what is meant by “receiving” within the context of the claim and disclosure.

In line 18, “the upper region” lacks antecedent basis.

In Reference to Claim 4

The phrases “is configured to prevent slipping” renders the claim indefinite read in light of the specification. The recitation of “is configured to prevent slipping” is not defined by the claim, the specification does not provide an explanation of what constitutes this configuration, and one of ordinary skill in the art would not be reasonably apprised of what configurations would or would not meet this recitation.

Claim Rejections - 35 USC § 103

8. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

9. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any

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evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

10. Claims 1 is rejected under 35 U.S.C. 103(a) as being unpatentable over US Patent No. 3,096,002 to Focht (Focht) in view of US Patent No. 3,865,283 to Hayes (Hayes).

In Reference to Claim 1

Focht teaches:

A foam head (“dispensing head”; col. 2, lines 13-25; Figs. 2-3) for a propellant container (Figs. 1 and 4;1), comprising:

a valve plate (2) having inner and outer crimped edges (Figs. 1 and 4), and a valve stem (5) supported on the valve plate (2);

an actuation button (12);

a foam dispensing opening (10), seated directly on the valve stem (5) (to the extend that applicant’s dispensing opening is seated directly on the valve stem, so to is Focht), wherein said valve stem is a spring-elastic valve stem (col. 2, line 56), wherein said spring-elastic valve stem (5) is configured to apply a resorting force (col. 2, lines 55-60) after actuation of said actuation button (12) for applying a partial amount of foam;

a lower portion (Figs. 1 & 4; below boss 8 above cup 2) having a lower region (below lower portion) and having an outer diameter approximately equal to an inner

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diameter of the inner crimped edge (see Figs. 1 and 4, the diameters are “approximately equal”);

an outer rib (Figs. 1 and 4; 7) disposed in the lower region of the lower portion, diametrically opposite the actuation button (12) for engagement from beneath of a lower side of the inner crimped edge (see Figs. 1 and 4),

Focht does not teach the following structures taught by Hayes:

wherein a lower peripheral region (Fig. 6; skirt portion 52b adjacent nibs / beads 54b) of the lower portion has at least one recess (Fig. 6; 55) for receiving an annular spring (“receiving” has been interpreted in light of the specification as “forming”), wherein said foam head is configured, such that upon actuation of said foam head, said foam head remains joined to said propellant container and is incapable of undesired removal from said propellant container (col. 4, line 67 to col. line 22).

It would have been obvious to one having ordinary skill in the art at the time of the invention to have included the teaching of Hays to incorporate at least one recess in the lower peripheral region of the skirt (13) of Focht in order to permit inward yielding of the skirt during assemblage to the container while maintaining the dispensing head on the container during use as taught by Hayes (col. 4, line 67 to col. 5, line 11).

11. Claims 2-4, and 6 are rejected under 35 U.S.C. 103(a) as being unpatentable over US Patent No. 3,096,002 to Focht (Focht) in view of US Patent No. 3,865,283 to Hayes (Hayes) and US Patent No. 3,156,382 to Michell (Michell).

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In Reference to Claim 2

Focht teaches:

A foam head (“dispensing head”; col. 2, lines 13-25; Figs. 2-3) having a propellant container (Figs. 1 and 4; 1), comprising:

a valve plate (2) having an inner and outer crimped edges (Figs. 1 and 4) and a valve stem (5) supported by the valve plate (2);

an actuation button (12);

a foam dispensing opening (10), seated directly on a valve stem (5) (to the extent that applicant’s dispensing opening is seated directly on the valve stem, so to is Focht), wherein said valve stem is a spring-elastic valve stem (col. 2, line 56), wherein said spring-elastic valve stem (5) is configured to apply a resorting force (col. 2, lines 55-60) after actuation of said actuation button (12) for applying a partial amount of foam

a lower portion (Figs. 1 & 4; below boss 8 above cup 2) having an outer diameter approximately equal to an inner diameter of the inner crimped edge (see Figs. 1 and 4, the diameters are “approximately equal”);

an outer rib (Figs. 1 and 4; 7) disposed in a lower region of the lower portion, diametrically opposite the actuation button (12) for engagement from beneath of a lower side of the inner crimped edge (see Figs. 1 and 4),

Focht does not teach the following structures taught by Hayes:

wherein a lower peripheral region (Fig. 6; skirt portion 52b adjacent nibs / beads 54b) of the lower portion has at least one recess (Fig. 6; 55) for receiving an annular spring (“receiving” has been interpreted in light of the specification as “forming”),

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wherein said foam head is configured, such that upon actuation of said foam head, said foam head remains joined to said propellant container and is incapable of undesired removal from said propellant container (col. 4, line 67 to col. line 22).

Focht does not teach the following structures taught by Michell:

a sleeve (11; Figs. 1-4) sheathing at least the upper region (19) of the propellant container (10), wherein the outer crimped edge (of mounting cup 12) is a connecting seat of said sleeve (col. 2, lines 27-33).

It would have been obvious to one having ordinary skill in the art at the time of the invention to have included the teaching of Hays to incorporate at least one recess in the lower peripheral region of the skirt (13) of Focht in order to permit inward yielding of the skirt during assemblage to the container while maintaining the dispensing head on the container during use as taught by Hayes (col. 4, line 67 to col. 5, line 11).

It would have also been obvious to one having ordinary skill in the art at the time of the invention to have incorporated the sleeve teaching of Michell into the foam head and propellant container of Focht as modified by Hayes in order to facilitate the inclusion of a desired over cap as explicitly taught by Michell (see col. 1, lines 26-53).

In Reference to Claim 3

The sleeve taught by Michell is a “graspable part” (see Figs. 1-4).

In Reference to Claim 4

The specification has not identified any particular structural features that provides the “configured to prevent slipping” and has not provided any standard by which the “configured to prevent slipping” can be ascertained. Consequently to the extent that

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applicant's device as claimed is slip proof, the sleeve of Michell as applied to the device of Focht as modified by Hayes is considered "configured to prevent slipping".

In Reference to Claim 6

Michell teaches an upper part of the sleeve (11) is provided with a clamping bead (35, 36; col. 3, lines 26-32) for mounting a guard cap (13) in such a way that it can be released again, and the outer diameter of the clamping bead (36; Fig. 5) is equal to the outer diameter of the crimped edge (outside of mounting cup 12; Figs. 5-6). When Focht as modified by Hayes is further modified by Michell, to include the sleeve and guard cap, the resulting device meets the claim. Michell further teaches that the sleeve (collar 11) permits the mounting of a desired size over cap (col. 1, lines 41-52).

Response to Arguments

12. Applicant's arguments filed May 24, 2010 have been fully considered but they are not persuasive.

Applicant's amendment has overcome the previous minor informality objection of claim 6.

Applicant's cancellation of claim 5 has obviated the objections and rejections associated with claim 5.

The replacement drawings have introduced new matter into the disclosure as discussed above. The issues related to the "spring-elastic valve stem" remain. The term phrase "spring-elastic valve stem" implies that the valve stem itself is made of an elastic material having a spring property. The figures however are not consistent with such an interpretation as the valve-

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stem (8) in the actuated position of Fig. 3 appears to be relatively rigid and merely tilting along with the foam head (1). Applicant's explanation is more consistent with the figures, but is not supported by the disclosure as originally filed. Specifically, the disclosure attributes the "spring-elastic" property to the valve stem and not distinct but related "elements" as described in the remarks and schematically depicted in the drawings. The arrangement described in the arguments appears to be similar to that shown in Figs. 3-4 of newly cited US Patent No. 2,631,814 to Abplanalp which is referenced in the first paragraph of the Focht patent applied in the rejections above. The standard for new matter is whether applicant had possession of the subject matter; in the instant case, the disclosure as filed and applicant's remarks do not show the required possession. In view of the confusion with respect to this issue a new rejection under 35 USC 112, second paragraph has been made, as it has become apparent that it is unclear as to what would or would not be encompassed by a "spring-elastic valve stem". The issues associated with the spring-elastic valve stem appear to be a fatal flaw which can not be corrected in this application. Of course any arguments or evidence to the contrary will be considered and reviewed on their merit.

Applicant states:

To more clearly define the present invention over the cited references, claims 1 and 2 were amended to define a "valve stem (8) supported by the valve plate (5)", as well as the "foam dispensing opening (7) seated directly on the valve stem (8)".

However, it is unclear how this defines over Focht, as the Focht valve stem (5) is supported on the valve plate (2) to the same extent as applicant's. Also Applicant's dispensing opening (7) at the top of the foam head (1) as disclosed is not reasonably characterized as being "seated directly on the valve stem (8)", to the contrary as depicted in Fig. 1, it is separated by a vertically

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extending passage. In any case, to the extent Applicant's device could be so characterized, Focht shows an analogous arrangement. As discussed previously, Focht states in the first paragraph of column 1,

This invention is a dispenser head adapted to be associated with an aerosol dispenser having a tubular valve stem which, when depressed, results in the discharge of the material from the dispenser through said hollow valve stem. Such an aerosol dispenser is exemplified by Patent No. 2,631,814 issued March 17, 1953, "Valve Mechanism for Dispensing Gases and Liquids Under Pressure," Robert H. Abplanalp.

Which depicts in Figs. 3-4 a valve stem arrangement appearing to be the same as Applicant's.

Applicants further state that the stem is part of the foam head, however as discussed above, the valve stem (8) as described in the specification is part of the valve plate which is part of the container rather than the foam head. Applicant's claims and arguments are inconsistent with the disclosure, consequently a new rejection under 35 USC 112, second paragraph has been made, as it has become apparent that it is unclear as to what the relationship should be.

Applicant's arguments with respect to the lower portion of the foam head providing a spring effect due to the recess "forming an annular spring" is not commensurate with the claims which call for "the lower portion (9) has at least one recess (16) for receiving and annular spring (17)". Receiving a spring is not the same as forming a spring; it appears that the argued arrangement is consistent with the disclosure but the claim language is not.

With respect to the arguments related to the art based rejections, it is initially noted that Applicant argues the references individually. One cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

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Applicant's also contain materially incorrect statements including:

Michell patent discloses an aerosol container with several mounting cups which are mounted on top of the container and do not comprise an outlet for providing aerosol; only one mounting cup (12) is mounted on the container (col. 2, lines 11-17);

Hayes shoulders extend along a complete circumference and can not provide tilting and does not included a lower edge with recesses; the shoulders (54b) are interrupted by slots (55) which allows the skirt (52b) to "yield inwardly", (col. 4, line 62 to col. 5, line 22) this inherently provides a flexibility to tilt.

In arguing the references, Applicant is essentially arguing a rejection that has not been set forth by the examiner. Focht is the primary reference and is being modified by Hayes and Michell. Focht already teaches the basic structure and operation of the tilting foam head according to the claims including the valve plate (2), actuating button (12), foam dispensing button (10), valve stem (5), elastic-spring (col. 2, lines 55-57), lower portion having a rib (7), etc. Hayes is relied upon for including the slots (55) which are taught to increase the ability to yield. Michell is relied upon for the sleeve (11). Applicant's arguments as to those structures that the individual reference lack for which they are not being relied upon in the rejection is irrelevant. If a single reference included all the necessary elements, the rejection would be based on anticipation rather than obviousness.

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The examiner has provided the rational and supporting teachings in the references to support the modifications as proposed in the rejections. For the reasons as provided above, the rejections are appropriate and are maintained.

Conclusion

13. Any inquiry concerning this communication or earlier communications from the examiner should be directed to KENNETH BOMBERG whose telephone number is (571)272-4922. The examiner can normally be reached on Monday-Thursday and alternative Fridays.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Kevin P. Shaver can be reached on (571)272-4720. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

14. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

KB

/Kenneth Bomberg/

Primary Examiner, Art Unit 3754